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No. 487

Supreme Court of the United States.

OCTOBER TERM, 1949.

AMOS L. TAYLOR, EXECUTOR UNDER THE WILL OF JESSE P. LYMAN, *Petitioner*,

v.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS

AND

BRIEF IN SUPPORT THEREOF.

WALDO NOYES,
SENECA B. ANDERSON,
Attorneys for Petitioner.

ANDREW G. GOODRICH & SON, LAW PRINTERS, BOSTON.

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v.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of Amos L. Taylor, Executor under the will of Jesse P. Lyman, pray that a writ of certiorari issue to review the decree dated November 14, 1949, of the Probate Court for the County of Middlesex and Commonwealth of Massachusetts entered after opinion and rescript from the Supreme Judicial Court of Massachusetts dated September 28, 1949, on the petition of said Amos L. Taylor filed in said Probate Court January 29, 1948, as amended by amendment filed June 24, 1948 (the original decree of said Probate Court being dated June 29, 1948)—all of which are set forth in full in the Record filed with this petition.

Opinions Below.

The original decree of the Probate Court for said County of Middlesex and Commonwealth of Massachusetts appears in the Record at page 10 thereof. The decree of said Probate Court after rescript from the Supreme Judicial Court appears in the Record at page 32. The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported 1949 Mass. Advance Sheets, 961; 324 Mass. 639; 88 N.E. (2d) 121, and appears in the Record at page 25 *ff*.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1257 (3) of the Judicial Code (U.S.C. (1948 revision), Title 28). Petitioner relies particularly upon that part of said Section 1257 (3) which permits certiorari "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States." Petitioner claims that the decree which is the subject matter of this petition denies him three immunities granted him by Federal statutes: (1) An immunity* from suit for the recovery of Federal taxes in all courts except a District Court of the United States; (2) an immunity† from suits for the recovery of Federal taxes not authorized by the Commissioner of Internal Revenue nor directed by the Attorney General; and (3) an

*Under U.S. Compiled Statutes, 1918, Compact Edition, § 5937 (R.S. § 3213), which was in effect when the Government commenced its action in the Probate Court, but which is now incorporated in U.S.C. (1946 ed.) Title 26, §§ 3744 and 3745 (c). This statute has uniformly been referred to in the Record and in the proceedings below as § 3744, and is so referred to herein.

†Under R.S. § 3214, which was in effect when the Government commenced its action in the Probate Court, but which is now in-

immunity from the enforcement of a Federal tax otherwise than as provided in U.S.C. (1946 ed.) Title 26, §§ 3690 (distraint) and 3744 (suit in Federal District Court) and predecessor statutes—particularly from having to respond to a "proceeding in court" before a State tribunal.

Statement of Facts.

Petitioner's testator died September 14, 1931 (R. p. 2, line 15); his estate was represented insolvent on January 4, 1933 (R. p. 1, line 3); and thereafter the Collector of Internal Revenue for the District of Massachusetts filed with the Commissioners in Insolvency, appointed by the Probate Court, a proof of claim on behalf of the United States for the balance of the 1930 income tax (R. p. 4, lines 88-90) (and other taxes which have since been satisfied on execution from a United States District Court and are not material to this petition (R. p. 9; p. 3, lines 52-55)) allegedly due from the decedent, assessed to him May 25, 1931 (R. p. 6). On January 3, 1934, the Commissioners filed their report in the Probate Court, in which they allowed the entire claim of the United States as a claim of the first class (R. p. 3, lines 52-55).

Thereafter the United States took no action to collect its tax until May 18, 1938, when it commenced an action in the United States District Court for the District of Massachusetts to collect the taxes as to which its proof of claim had been allowed by the Commissioners (R. p. 4, lines 90-93). The United States District Court, on the ground of the Federal statute of limitations, U.S.C. (1946 ed.) Title 26, § 276 (c), dismissed the count demanding the 1930 tax "without prejudice to the right of the Plaintiff to prose-

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corporated in U.S.C. (1946 ed.) Title 26, § 3740. This statute has also been uniformly referred to in the Record and in the proceedings below as § 3740, and is so referred to herein.

cute any other timely proceeding upon the same subject matter pending in another court" (R. p. 4, lines 99-101), but entered judgment for the balance of the Government's claim (the "other taxes" referred to above), on which execution was issued and satisfied in due course (R. p. 9; p. 3, lines 52-55).

In 1947 the estate of Jesse P. Lyman became solvent and thereafter, on January 29, 1948, Mr. Taylor as executor filed a petition (R. p. 7) in the Probate Court asking that the estate be declared solvent and asking that the claim of the United States be disallowed or reduced. An amendment to this petition (R. p. 9) challenged the authority of the Collector of Internal Revenue to file the Government's proof of claim with the Commissioners in Insolvency on the ground that the requirements of U.S.C. (1946 ed.) Title 26, § 3740, had not been complied with (R. p. 9). At the hearing on the petition neither party offered any evidence on this question (R. p. 5).

The Probate Court made no specific finding or decision with respect to this question, although it approved the Stipulation (R. p. 5); the Supreme Judicial Court, while expressing doubt as to whether this proof of claim was a suit within the meaning of U.S.C. (1946 ed.) Title 26, § 3740, said that in any event, in the absence of proof by the taxpayer, the authority of the Collector was to be presumed (R. p. 31). The Petitioner also raised the question in the Probate Court as to whether any State court could take jurisdiction of a claim by the United States for the recovery of taxes, or whether such jurisdiction is vested exclusively in the Federal District Courts under U.S.C. (1946 ed.) Title 26, §§ 3744 and 3745 (c). The Probate Court considered said question (R. p. 4, lines 83-88 and lines 107-114), sustaining your Petitioner's contention. The Supreme Judicial Court on appeal considered said question in Part 3 of its opinion (R. pp. 28-31) and held

that the Government's proof of claim before the Commissioners in Insolvency was not a suit to recover taxes within the meaning of § 3744, but was, on the contrary, only a "proceeding in court," and reversed the Probate Court.

The Probate Court found the estate solvent (R. p. 2, lines 40-42) and modified the report of the Commissioners by reducing the claim of the United States by the amount of the balance due on the controverted 1930 tax (the satisfied execution on the balance of the Government's claim having automatically operated to discharge the liability of the executor with respect to that part of the claim allowed by the Commissioners which had been satisfied upon said execution).

On appeal by the United States, the Supreme Judicial Court ruled that the Probate Court should not have reduced the claim of the United States, and issued rescript accordingly.

Questions Presented.

(1) Whether a claim filed before Commissioners in Insolvency appointed by the Probate Court pursuant to Massachusetts General Laws, c. 198, § 2, is a "suit" within the meaning of U.S.C. (1946 ed.) Title 26, §§ 3740 and 3744 and predecessor statutes.

(2) Whether U.S.C. (1946 ed.) Title 26, § 3744 and predecessor statutes, confers exclusive jurisdiction on the District Courts of the United States of "suits" for the recovery of Federal taxes.

(3) Whether there is a presumption that a suit for the recovery of Federal taxes has been authorized by the Commissioner of Internal Revenue and directed by the Attorney General, as required by U.S.C. (1946 ed.) Title 26, § 3740, where the Government fails to allege such authority and direction, the taxpayer pleads lack thereof, and no evidence is introduced on the issue by either party.

(4) Whether, if this claim was only a "proceeding in court," there is any statutory or other authority which permits the Collector of Internal Revenue to employ such a "proceeding" for the collection of a Federal tax before the Government's claim has been reduced to judgment in a District Court of the United States.

Statutes Involved.

Please re-read the footnotes, page 2.

The statute referred to in the Record as I.R.C. § 3744, and in this petition as U.S.C. (1946 ed.) Title 26, § 3744, was, at the time of the filing of the Government's proof of claim before the Commissioners in Insolvency, U.S. Compiled Statutes, 1918, Compact Edition, § 5937. This section remained in effect without change until 1939, when all statutes relating to internal revenue were codified in the Internal Revenue Code. The statute actually applicable to this case is, therefore, U.S. Compiled Statutes, 1918, Compact Edition:

> "§ 5937. *Suits for fines, penalties, and forfeitures, and taxes*—It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any (circuit or) district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and **taxes** may be sued for and recovered in the name of the United

States, in any proper form of action, before any (circuit or) district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. (R. S. §3213)" (Emphasis supplied.)

In the same way the statute so referred to as I.R.C. § 3740, and U.S.C. (1946 ed.) Title 26, § 3740, was, until 1939, R.S. § 3214, which then provided as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Commissioner authorizes or sanctions the proceedings *and the Attorney General directs that the suit be commenced.*" (Emphasis supplied.)*

Specifications of Errors.

The Petitioner urges that the Supreme Judicial Court of Massachusetts erred—

(1) In refusing to find that the Government's proof of claim before the Commissioners in Insolvency is a "suit" for the recovery of taxes within the meaning of U.S.C. (1946 ed.) Title 26, § 3744, which can be brought only in a District Court of the United States (see Brief, p. 16 *ff.*);

(2) In refusing to find that the Government's proof of claim before the Commissioners in Insolvency is a suit for

*This section was a revision of Act of July 13, 1866, c. 184, § 9, 14 Stat. 111. The italicized words were added to this section by Revised Statutes, § 16, Act of March 3, 1933. Inasmuch as the Commissioners did not accept their appointment until April 28, 1933 (R. p. 17, bottom), it is evident that the requirement that the Attorney General direct that suit be commenced was in force at the time the Government's claim was filed with the Commissioners in Insolvency. We make note of this because the Record does not include the Government's proof of claim nor show the date on which it was filed.

the recovery of taxes within the meaning of U.S.C. (1946 ed.) Title 26, § 3740, which requires as conditions precedent the authorization of the Commissioner of Internal Revenue and the direction of the Attorney General;

(3) In ruling, where the Government has not pleaded the authority and direction required by U.S.C. (1946 ed.) Title 26, § 3740, nor offered any proof with respect thereto in the face of the Petitioner's plea of lack of such authority and direction, "that in the absence of proof to the contrary the necessary authority and direction are to be presumed"; and

(4) In entertaining jurisdiction of a proceeding by the United States to recover Federal taxes in a State court when U.S.C. (1946 ed.) Title 26, § 3690 and § 3744, specifically provides that the remedies of the United States for the recovery of taxes are (*a*) distraint, (*b*) suit in a District Court of the United States.

Reasons Why Certiorari should be Granted.

(1) Both U.S.C. (1946 ed.) and its predecessor statutes in force at the time the Government's claim was filed with the Commissioners in Insolvency appointed by the Probate Court provide the United States with only two methods for enforcing payment of Federal income taxes. One of these is distraint (U.S.C. (1946 ed.) Title 26, § 3690); the other is by suing for their recovery in a District Court of the United States (U.S.C. (1946 ed.) Title 26, § 3744).

Collectors of Internal Revenue in such widely scattered districts as New York, Florida, Illinois, and Massachusetts, as indicated by reported decisions, have nevertheless had recourse to a third (unauthorized) method of collecting Federal taxes due from decedents—by filing claims therefor in the State tribunal administering the estate of the decedent taxpayer.

This practice has been permitted by the courts of New York, Florida, and Illinois *where no one has raised the issue of jurisdiction.*

Matter of Gellatly, 283 N.Y. 125.
United States v. *Embrey,* 145 Fla. 277; 199 So. 41.
Harrison v. *Deutsch,* 294 Ill. App. 8.

In this case it has the sanction of the Supreme Judicial Court of Massachusetts, *in spite of the fact that your Petitioner seasonably challenged the jurisdiction of the Probate Court.* The Supreme Judicial Court of Massachusetts neither affirms nor denies that U.S.C. (1946 ed.) Title 26, § 3744, or its predecessor statutes, limits suits for the recovery of Federal taxes to the District Courts of the United States. It says that the procedure followed by the Collector of Internal Revenue—filing a claim with the Commissioners of Insolvency appointed by the Probate Court* —while a "suit" for purposes of the local statute of limitations—

Aiken v. *Morse,* 104 Mass. 277, 281;
Commissioner of Insurance v. *Bristol Mutual Liability Insurance Company,* 279 Mass. 325;
First Portland National Bank v. *Taylor,* 323 Mass. 492, 495—

is a mere "proceeding in court" and not a "suit" within the meaning of the Federal statutes relating to the collection of taxes. This is consistent with an earlier decision of the same Court—

Du Vivier v. *Hopkins,* 116 Mass. 125—

in which it was held that such a claim was not a "suit" within the meaning of the Federal removal statutes (U.S.C.

*See Brief, p. 30, for analysis of the State statutes pertaining to Commissioners in Insolvency.

(1946 ed.) Title 28, § 71, and predecessor statutes; see now § 1441 of 1948 version), but is in direct conflict with two later decisions of this Court—

Hess v. *Reynolds*, 113 U.S. 73; and
Clark v. *Bever*, 139 U.S. 96, 102—

in which this Court held that claims under the strikingly similar* statutes of Michigan and Iowa were "suits."

Furthermore, the Supreme Judicial Court of Massachusetts ignores the definitions of "suit" contained in numerous decisions of this Court—

Cohens v. *Virginia*, 6 Wheat. 264, 407;
Weston v. *City Council of Charleston*, 2 Pet. 449, 464;
Holmes v. *Jennison*, 14 Pet. 540, 566—

and even in its own decisions.

Boston v. *Turner*, 201 Mass. 190, 196.

This Court has never decided whether U.S.C. (1946 ed.) Title 26, § 3744, or any of its predecessor statutes, limited jurisdiction to the District Courts of the United States, but it has held that other Federal statutes employing like language had that effect.

General Investment Company v. *Lake Shore & Michigan Southern Railway Company*, 260 U.S. 261.
Freeman v. *Bee Machine Company, Inc.*, 319 U.S. 448, 453.

(For an analysis and history of this statute which show that it confers exclusive jurisdiction, please see Brief, p. 16 *ff.*)

*The procedure under these statutes is set out in the opinions just cited.

It thus appears that the actual effect, if not the theory and language of the decision below, is in conflict with the applicable Federal statute and the decisions of this Court.

(2) U.S.C. (1946 ed.) Title 26, § 3740, and its predecessor statutes, provide that a suit for the recovery of a Federal tax may not be brought without authorization of the Commissioner of Internal Revenue and direction of the Attorney General.

The Supreme Judicial Court of Massachusetts, while doubting that the Government's proof of claim constituted a "suit for the recovery of taxes," ruled that, even if it were a suit, in the absence of evidence to the contrary there was a presumption in favor of such authorization and direction. This presumption was held to exist even though the taxpayer specifically pleaded lack of such authority and direction (R. p. 9). The Record is devoid, not only of any evidence, but even of any allegation by the Government, that the necessary authority and direction in fact existed.

Here we are confronted with a great deal more than a question of evidence. Congress has imposed two requirements to be complied with before a taxpayer may be sued for a Federal tax—the authorization of the Commissioner and the direction of the Attorney General. Proof of such authorization and direction has been held essential to the Government's case by the lower Federal courts in—

> *Olson* v. *Mellon* (D.C.), 41 Fed. Sup. 947; aff'd *per curiam* (C.C.A. 3), 71 Fed. (2d) 1021; cert. den. 293 U.S. 615 (under the name of *United States, ex rel. Knight,* v. *Mellon,* 442).*

*Decided before the re-enactment of the statute in I.R.C., so that there has been legislative approval of this decision.

It is only where the taxpayer has admitted jurisdiction and failed to allege lack of authority that it may be presumed.

> *United States* v. *Cadillac Sedan,* 145 Fed. (2d) 296, 299.*

Furthermore, this Court has repeatedly held that the presumption that public officers have done their duty is not a substitute for proof of an independent and material fact in the absence of all evidence.

> ". . . The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his Treatise on Evid., sect. 300, says, 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, *where there is general evidence* of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' *Nowhere is the presump-*

*In that case the appellant had filed a petition to intervene in which she admitted specifically that "the allegations made in said libel are within the jurisdiction of this Court" (p. 299 [5]), and in the petition to intervene did not allege any lack of authority in the Commissioner. The Court held "that in the absence of the issue being raised specifically by the intervener's petition, the Court will presume that the action of the United States Attorney General in bringing such action was authorized" (p. 299 [6]). In the instant case the Commissioner's authority was seasonably challenged in the present Petitioner's amended original petition (R. p. 9).

tion held to be a substitute for proof of an independent and material fact.'' (Emphasis supplied.)

United States v. *Ross,* 92 U.S. 281, 284.

To the same effect are—

Sabariego v. *Maverick,* 124 U.S. 261, 284.
United States v. *Carr,* 132 U.S. 644, 653.

It takes but a moment's reflection to see that the presumption in which the Supreme Judicial Court indulged is in reality a judicial negation of the intent of Congress. The existence or lack of existence of administrative action by the Commissioner of Internal Revenue in authorizing a suit such as this, and administrative action by the Attorney General in directing its commencement, are facts peculiarly within the knowledge of the officers of the United States. The taxpayer has no knowledge of whether such acts have or have not taken place. As a practical matter all he can do is demand that the Government produce the proof. How better can this be done than by denying authority and direction in his pleadings?

When a State court nullifies an Act of Congress by indirection, it impedes Congressional intent as effectively as if it held that Act unconstitutional.

Where it does so in direct conflict with a decision of a United States Circuit Court of Appeals handed down prior to Congressional re-enactment of the statute thus nullified, Petitioner can think of no better reason why this Court should grant certiorari.

(3) Lastly, the decision of the Supreme Judicial Court of Massachusetts sanctions a novel method for collecting Federal taxes not authorized by Congress, namely, by a ''proceeding in court'' before a State tribunal.

It is well settled that, where a statute creating a liability provides the remedies for its enforcement, those remedies are exclusive.

> *Tennessee Coal, Iron & Railroad Company* v. *George*, 233 U.S. 354, 359, and cases cited.
> *International Paper Company* v. *Commonwealth*, 232 Mass. 7, 10.

The Supreme Judicial Court in its opinion lays great stress on the fact that even if a judgment had been obtained in the District Court of the United States under U.S.C. (1946 ed.) Title 26, § 3744, such judgment "would have had to be presented to the Probate Court substantially as has already been done. In no other way could the United States receive payment." (Obviously this is true only so long as the estate remained insolvent—see Brief, p. 31.) This argument fails to take into account that the tax claim would then be merged in the judgment of the Federal Court and that neither the letter nor the spirit of U.S.C. (1946 ed.) Title 26, § 3744, would then be violated. Since the claim would be on the judgment, not on the tax, the letter would be preserved; since the taxpayer would have had his day in the Federal Court, the spirit and intent would be given effect.

These are important questions of Federal law which have not yet been decided by this Court, although similar questions have been decided by it contrary to the decision below. These questions are not only vital to this case; they affect executors and administrators generally. They are of importance to our Federal system—

> Cf. *Wilkerson* v. *McCarthy*, 93 L. Ed. 403, 411—

since they concern themselves with the jurisdiction and method to be employed in the collection of Federal taxes from the estates of deceased persons.

The only reported decision even citing U.S.C. (1946 ed.) Title 26, § 3744, is the case at bar, a decision of a State court. By calling a judicial proceeding having every element of a "suit" a mere "proceeding in court," it extends State jurisdiction to a class of cases which Congress restricted to the Federal courts. Such a result merits review by this Court.

Wherefore, the undersigned, on behalf of Amos L. Taylor, Executor under the will of Jesse P. Lyman, Petitioner, respectfully pray that this petition for certiorari be allowed.

WALDO NOYES,

SENECA B. ANDERSON,

Attorneys for AMOS L. TAYLOR,

Executor u/w Jesse P. Lyman.

BRIEF IN SUPPORT OF PETITION.

I.

United States Code (1946 ed.) Title 26, § 3744, and predecessor statutes confer exclusive jurisdiction of suits for the recovery of Federal taxes on the District Courts of the United States.

The jurisdiction of State courts to enforce ordinary claims of the Government, whether against a debtor, against the estate of a decedent, or in receivership proceedings, is too well settled to be questioned.

> *Cotton* v. *United States,* 11 How. 228, 231.
> *United States* v. *Summerlin,* 310 U.S. 414; 84 L. Ed. 1283.
> *United States* v. *Commissioner of Banks,* 254 Mass. 173.

Federal tax claims, however, are not ordinary claims; they arise and are enforceable only by virtue of the statutes of the United States.

The Government assessed the tax in question in 1931 (R. p. 6) and filed its proof of claim in 1933 (R. p. 4, lines 88-90). What did the statutes of the United States then provide with respect to suits by it for taxes?

U.S. Compiled Statutes, 1918, Compact Edition, § 5937, was in effect at both times and remained in effect without change until 1939, when all statutes relating to internal revenue were codified in the Internal Revenue Code. The applicable statute, therefore, is—

> "§ 5937. *Suits for fines, penalties, and forfeitures, and taxes*—It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums

which may be forfeited by law. All suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any (circuit or) district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and **taxes** may be sued for and recovered in the name of the United States, in any proper form of action, before any (circuit or) district court or the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. (R. S. § 3213.)" (Emphasis supplied.)

If we add to a careful study of this statute, a study of its historical origin, and a study of its disposition when it became consolidated into the Internal Revenue Code, the proposition of this section of our brief becomes as clear as day: no State court has jurisdiction of a suit by the United States for the recovery of taxes payable to it.

Now, looking first at § 5937, the first sentence relates only to forfeiture and places the duty of collection upon the collectors of revenue in their respective districts. The second sentence is divided by a semi-colon. The first part provides for suits in the name of the United States to recover fines, penalties, and forfeitures, and provides that such suits may be instituted in any District Court of the United States "or before any other court of competent jurisdiction"—taxes are not included in the foregoing provision but become the subject matter of the second half of this same sentence, and it is very noticeable that jurisdiction for the recovery of **taxes** is conferred upon the Dis-

trict Courts of the United States and there is conspicuously absent any provision that such taxes may be sued upon in "any other court of competent jurisdiction." These provisions are contained in the same sentence, in intimate juxtaposition, and are separated only by a semi-colon; it is clear that fines, penalties and forfeitures are treated in one way, and **taxes** in another way.

This statute is as clear and specific as it is possible for any statute to be; there is no ambiguity to be construed by the Court, and in any event this Court could not in construction, even under the pretense of resolving an ambiguity, insert or imply new and far-reaching words which do not appear in the statute itself. As this Court has said:

> "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."
>
> *Adams Express Company* v. *Kentucky*, 238 U.S. 190, 199.

The Supreme Judicial Court says (R. p. 30):

> "We are not prepared to believe that the Congress intended that suits must be brought in District Courts of the United States upon all undisputed claims for taxes against the estates of deceased persons . . ."

This seems to your Petitioner a violation of the rule of construction enunciated by this Court:

> ". . . where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. . . . it is not

for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

Denn v. *Reid,* 10 Pet. 524, 527.

"The guiding principle for the interpretation of a statute is that it must be construed, if reasonably possible, so as to effectuate the purpose of the framers, ascertained from its several parts and the meaning fairly attributable to all its words, considered in connection with the cause of its enactment, the subject to which it is applicable, *the preëxisting state of the* common and *statutory law,* the mischief to be remedied and the object to be accomplished. It must be interpreted as enacted. Its omissions cannot be supplied and its excrescences cannot be cut out by the judicial department of government. The court can only interpret according to the common and approved usages of the language the words used, *without enlargement* or restriction *and without regard to its own conceptions of expediency.*" (Emphasis supplied.)

Commonwealth v. *S. S. Kresge Company,* 267 Mass. 145, 148.

The only thing which could have made this statute more unambiguous would have been to draft the statute after the fashion of New York lawyers, and for the part which relates to taxes to have been redundant by saying specifically that no State court should have jurisdiction. No Federal statute that we have been able to discover has been redundant in that way. In this particular case we have practically the equivalent of such an affirmative prohibition, however, first in the fact that, whereas the 1815 stat-

ute (on the next page) had expressly given jurisdiction to State courts, such jurisdiction is clearly withdrawn by the Statute of 1866 (on page 22). No clearer change of front or point of view can well be imagined. The Congress which made this change was the first after the Civil War, and it requires little imagination to understand that this Congress did not care to entrust the collection of the revenues of the United States to any but Federal judges; secondly, in other incidental wording of the statute itself, namely, the fact that proceedings for the recovery of fines, penalties, and forfeitures shall be brought ". . . in any proper form of action, *or by any appropriate form of proceeding, qui tam or otherwise,* before any district court of the United States . . . or before any other court of competent jurisdiction;" whereas suits for taxes in the latter half of the same section may only "be sued for and recovered in . . . any proper form of *action,* before any . . . district court . . . ," there being conspicuously absent any reference to any other form of "proceeding" or any other court.

A study of the legislative history of § 5937 (R.S. § 3213), and the disposition of the provisions of that section when it became incorporated in the Internal Revenue Code by consolidation, corroborates beyond question the proposition of this section of our brief.

On March 8, 1806, Congress enacted "An Act to Extend Jurisdiction in Certain Cases to State Judges and State Courts" (2 Stat. 354).

This statute extended jurisdiction to County courts in certain thinly settled areas of all complaints and prosecutions for fines, penalties, and forfeitures arising under the revenue laws of the United States, but provided expressly that this jurisdiction should not extend to civil suits for the collection of any duties payable to the United States.

Section 3 of the statute provided that this act should remain in force "during the term of one year, from its passage, and thence to the end of the next session of Congress thereafter, and no longer."

The Act of April 21, 1808, 2 Stat. 489, continued the foregoing act without limit of time.

The Act of March 3, 1815, 3 Stat. 244, expressly conferred on State and County courts concurrent jurisdiction with the United States courts of "all complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures arising under" any internal revenue law and payable to the United States.

The Act of June 30, 1864, 13 Stat. 239, provided:

> "Sec. 41. And be it further enacted, That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the duties and taxes imposed by this act, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by virtue of this act; and all fines, penalties, and forfeitures which may be incurred or imposed by virtue of this act shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and where not otherwise and differently provided for, one moiety thereof shall be to the use of the United States, and the other moiety thereof to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred: Provided, That in case of any

suit brought upon information received from any person, other than a collector, deputy collector, assessor, assistant assessor, or inspector, of internal revenue, the United States shall not be subject to any costs of suit, nor shall the fees of any attorney or counsel employed by any such officer be allowed in the settlement of his account unless the employment of such attorney or counsel shall be authorized by the commissioner of internal revenue, either express or by general regulations."

Two years later came the Act of July 13, 1866, 14 Stat. 111, which has remained substantially unchanged since its enactment:

"That section forty-one be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties, and forfeitures which may be incurred or imposed by law, shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction. And **taxes** may be sued for and recovered, in the name of the United States, in any proper form of action before any circuit or district court of the United States for the district within which the liability to such tax may have been or shall be in-

curred, or where the party from whom such tax is due may reside at the time of the commencement of said action. But no such suit shall be commenced unless the commissioner of internal revenue shall authorize or sanction the proceedings: Provided, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector, deputy collector, assessor, assistant assessor, revenue agent, or inspector of internal revenue, the United States shall not be subject to any costs of suit, nor shall the fees of any attorney or counsel employed by any such officer be allowed in the settlement of his account, unless the employment of such attorney or counsel shall be authorized by the commissioner of internal revenue, either expressly or by general regulations." (Emphasis supplied.)

U.S. Revised Statutes, Second Edition, 1877, shows only minor changes from the Act of July 13, 1866:

"Sec. 3213. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and **taxes** may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which

> the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action." (Emphasis supplied.)

The Act of March 3, 1911, c. 231, § 289, 36 Stat. 1167, affected this statute in that it deprived the United States Circuit Courts of jurisdiction. Thus in U.S. Compiled Statutes, 1918, Compact Edition, we find that § 5937 is identical with R.S. § 3213, just quoted, except that parentheses are inserted around the words "circuit or" (see p. 17).

Now what happened to § 5937 when the Internal Revenue Code was consolidated in 1939? Sections 3744 and 3745 (c) embody these provisions as follows:

> "§ 3744. *Suits for taxes.* Taxes may be sued for and recovered in the name of the United States in any proper form of action, before any district court of the United States, for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of said action."
>
> "§ 3745(c). *Plaintiff, proceedings, and venue.* All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, *or before any other court of competent jurisdiction.*" (Emphasis supplied.)

First we notice that the order of provisions has been transposed; taxes are first disposed of and then fines, pen-

alties, and forfeitures. Next we notice that jurisdiction of suits for taxes by the United States are limited strictly to the District Courts of the United States without any mention of "any other court of competent jurisdiction," thus preserving exactly the applicable provisions of § 5937 which relate to taxes; but that in § 3745 (c) jurisdiction is also extended to "any other court of competent jurisdiction," thus preserving exactly the provisions applicable to fines, penalties, and forfeitures of § 5937. In view of the past history of these statutes there can be no doubt that this distinction is intentional and not the result of inadvertence. There is no possible ambiguity.

The adoption by Congress of the Internal Revenue Code constitutes a re-enactment of all provisions of earlier laws which have been incorporated therein; and the significance of this is that it shows that the policy originally adopted by Congress in 1866 of restricting jurisdiction of tax-recovery suits to the Federal courts has consistently been the policy of the Congress since 1866, and still is.

It seems clear that, where a statutory right is created and the statute provides the means for its enforcement, that means is the exclusive one.

> *Tennessee Coal, Iron & Railroad Company* v. *George,* 233 U.S. 354, 359, and cases cited.

Thus in—

> *International Paper Company* v. *Commonwealth,* 232 Mass. 7, 10—

the Supreme Judicial Court, which was interpreting a State statute giving an aggrieved taxpayer a remedy from a State tax, said:

> "Where a remedy is created by statute and the time within which and the method according to which it

must be pursued are prescribed as conditions under which it can be availed of, the court has no jurisdiction to entertain proceedings for relief begun at a later time or prosecuted in a different method."

Many Federal statutes similar to § 3745 (c) expressly confer jurisdiction on a United States District Court or "any other court of competent jurisdiction."

Thus the Fair Labor Standards Act, U.S.C. (1946 ed.) Title 29, § 216, provides expressly that suit may be brought "in any court of competent jurisdiction."

Similarly, the Emergency Price Control Act of 1942, U.S.C. (1946 ed.) Title 50 App., § 925, provides that the action will lie "in any court of competent jurisdiction."

Suits under these statutes have been held to lie either in the Federal or in the State courts.

Adams v. *Long,* 65 Fed. Sup. 310, 312.
Forsythe v. *Central Foundry Company,* 240 Ala. 277; 198 So. 706.
Kersting v. *Hardgrove,* 24 N.J. Misc. R. 243; 48 Atl. (2d) 309.

On the other hand, from time to time Congress has enacted statutes with substantially the same wording as is now found in § 3744. Typical of these statutes are those dealing with the antitrust laws. Thus the Clayton Act, U.S.C. (1946 ed.) Title 15, § 15, provides as follows:

"§15. *Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor *in any district court of the United States* in the district in which the defendant resides or is found or has an agent, without respect to

the amount in controversy, . . ." (Emphasis supplied.)

Similarly, the Sherman Antitrust Act, U.S.C. (1946 ed.) Title 15, § 4, provides:

"§4. *Jurisdiction of courts; duty of district attorneys; procedure.* The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title . . ."

It has been held repeatedly that these and similar provisions in the Clayton Act and the Sherman Act confer jurisdiction on the United States District Court only, and that suits to recover damages allowed by these statutes may not be brought in a State court. In—

General Talking Pictures Corporation v. *De Marce,* 203 Minn. 28; 279 N.W. 750—

the plaintiff brought suit in a State court for recovery on a note. The defendant, by way of counterclaim, alleged that he was entitled to the treble damages provided by the Clayton Act. The Court, in dismissing the counterclaim, said that this section had been widely construed by both State and Federal courts to vest exclusive jurisdiction of issues arising under it in the Federal courts alone.

Similarly, in—

General Investment Company v. *Lake Shore & Michigan Southern Railway Company,* 260 U.S. 261; 67 L. Ed. 244—

a plaintiff, who was a stockholder in the defendant railways, brought suit in the State court to enjoin a proposed merger, on the ground that it was illegal since it would vio-

late the Sherman Antitrust Act. The suit was removed to the Federal District Court, and reached this Court on appeal. The question raised was whether the State court had jurisdiction of the suit when it was commenced.

The statute, U.S.C. (1946 ed.) Title 15, § 26, provided:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ."

The Court said:

> "This section undoubtedly enlarges the remedies provided in the Sherman Anti-Trust Act to the extent of enabling persons and corporations threatened with loss or damage through violations of that act to maintain suits to enjoin such violations, save in the instances specified in the proviso. This right to sue, however, is granted in terms which show that it is to be exercised only in a 'court of the United States.' This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act."

See also a later affirmation of this same doctrine as to § 4 of the Clayton Act in—

> *Freeman* v. *Bee Machine Company, Inc.*, 319 U.S. 448, 453; 87 L. Ed. 1509, 1514.

From the above cases, it is clear that where a Federal statute expressly grants jurisdiction of a suit to a United

States District Court on a right created by virtue of a Federal statute, and does not contain any language indicating that jurisdiction is also granted to State courts or "courts of competent jurisdiction," jurisdiction conferred upon the United States District Court is exclusive.

There have been cases in other jurisdictions where Federal tax claims have been enforced in State tribunals. However, we have been unable to discover any case where the Court considered the effect of § 3744 or any of the statutes since 1866 which preceded it. Such cases simply assume jurisdiction. Typical are:

Matter of Gellatly, 283 N.Y. 125—

in which the New York Court of Appeals said:

> "The right of the United States Government to bring proceedings for the settlement of the accounts of the representative of a decedent in order to obtain payment of a claim for unpaid taxes or other indebtedness *is not disputed*" (emphasis supplied);

and—

United States v. *Embrey,* 145 Fla. 277; 199 So. 41;
Harrison v. *Deutsch,* 294 Ill. App. 8—

in which there is no mention of jurisdiction to enforce tax claims as such. Since it is obvious that the attention of these courts was never directed to § 3744, it is apparent that their decisions are of no value to the Government as precedents in this case, where this issue has been seasonably raised and relied upon.

These cases, nevertheless, are of importance on the issue of whether certiorari should be granted, since they show a spreading practice which may be encouraged by the decision challenged by this petition.

II.

A claim before Commissioners in Insolvency appointed by a Massachusetts Probate Court pursuant to Massachusetts General Laws, c. 198, § 2, is a "suit" within the meaning of U.S.C. (1946 ed.) Title 26, §§ 3740 and 3744 and predecessor statutes.

In order to assist this Court in determining whether the Government's claim in this case is a "suit" within the meaning of §§ 3740 and 3744, or, as held by the Supreme Judicial Court, a mere "proceeding in court," it seems desirable to review briefly the procedure under which the claim was filed.

Massachusetts, unlike some jurisdictions, does not provide that claims against a solvent estate for the debts of the decedent must be filed with the Probate Court. If an executor or administrator does not, within six months after his qualification, "have notice of demands against the estate of the deceased sufficient to warrant him to represent such estate to be insolvent, he may, after the expiration of said six months, pay the debts due from the estate . . ." (Massachusetts General Laws, c. 197, § 2). If he fails to pay any debt, the creditor must bring an action within one year of the qualification of the administrator or executor or be forever barred (Massachusetts General Laws, c. 197, § 9). See—

> *First Portland National Bank* v. *Taylor,* 323 Mass. 492, 495-496.

Such actions are not brought by the creditors in the Probate Court, but in the usual courts of general trial jurisdiction.

On the other hand, if the executor or administrator believes the assets may prove insufficient to pay the claims of creditors in full, he represents to the Probate Court that

the estate is probably insolvent. The Probate Court, if it finds from such representation that the assets are probably insufficient, may pursue either of two courses: it may appoint two or more Commissioners "to receive and examine all claims of creditors against such estate, and to return a list of all claims presented to them, with the amount allowed on each," or the Probate Court may perform this task (Massachusetts General Laws, c. 198, § 2).

If Commissioners are appointed, as was the situation in the case at bar (R. p. 1), they must be sworn and they must fix a time and place for hearings, and must give all known creditors written notice thereof. At the expiration of the time allowed for filing claims, they are required to prepare their return, notify the administrators, executors, legatees, and devisees thereof, and file their report in the Registry of Probate (Massachusetts General Laws, c. 198, § 3).

The Commissioners may require claimants to make true answers under oath (*ibid.* § 7).

Where Commissioners are appointed an aggrieved party "may appeal from their decision to the superior court for the county where the probate or administration was granted, and the claim shall thereupon be tried and determined in like manner as if an action at law had been brought therefor by the supposed creditor against the executor or administrator." If the Probate Court, instead of Commissioners, examines the claim, the appeal is to the Supreme Judicial Court (*ibid.* § 11). Appeals must be taken within twenty days after the return of the Commissioners (*ibid.* § 12).

After the return is filed, and appeals are disposed of, the Probate Court makes an order of distribution (*ibid.* § 19). If, however, the assets are sufficient, the executor or administrator pays the claims allowed in full (*ibid.* § 23).

From the above it is clear that the filing of a claim by a creditor with Commissioners in Insolvency is the institu-

tion of a proceeding under which he seeks a judicial determination and enforcement of his claim.

Such a procedure falls within the definition of a "suit" given by Chief Justice Marshall in both—

Cohens v. *Virginia,* 6 Wheat. 264, 407:

> "What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be "the lawful demand of one's right." Or, as Bracton and Fleta express it, in the words of Justinian: "jus prosequendi in judicio quod alicui debetur."' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.
>
> "To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand."

and—

Weston v. *City Council of Charleston,* 2 Pet. 449, 464:

> "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a

right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit''—

an opinion which was expressly approved by Chief Justice Taney in—

Holmes v. *Jennison,* 14 Pet. 540, 566:

"We entirely concur in the definition thus [i.e., *Weston* v. *City Council of Charleston*] given of the meaning of the word 'suit,' as used in the act of 1789.''

Even more to the point than these definitions of the word "suit'' are:

Hess v. *Reynolds,* 113 U.S. 73; and
Clark v. *Bever,* 139 U.S. 96, 102.

In the latter case the Court was confronted with the question of whether a claim of a creditor against an estate brought under an Iowa statute, strikingly similar to the Massachusetts statute, was a "suit'' which could be removed to the Circuit Court of the United States.

Since this case is not only specific on the point that a proceeding such as this is a "suit,'' but answers the arguments advanced by the Supreme Judicial Court in the case at bar, in support of its ruling that the Government's claim is not a suit, we quote from it at length, at p. 102:

"It is suggested that the claim in suit here is a mere incident to the marshalling and distribution of the estate of Greene; that such estate can only be administered and distributed by the state court in accordance with the laws of the State; and that the Circuit Court of the United States was without jurisdiction to determine whether it was or not a valid claim against that

estate. This position is wholly untenable. As the proceeding involved a judicial determination as to the liability of Greene's estate for the amount of Clark's claim, with parties before the court to contest all the questions of law and fact, it was clearly a 'suit,' within the meaning of the act of Congress providing for the removal of suits to the Circuit Courts of the United States. The removal in this case was, therefore, proper, unless it be competent for a State, by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction of the courts of the United States even in cases where the constitutional requirement as to citizenship is met. But this court has decided, upon full consideration, that no such result can be constitutionally effected by state legislation. The case of *Hess* v. *Reynolds*, 113 U. S. 73, 77, involved a disputed claim originally filed in a probate court of Michigan, carried by appeal to a Circuit Court of the same State, and subsequently removed to the Circuit Court of the United States for the District of Michigan. Substantially the same question of jurisdiction was raised in that case that is here presented. This court said: 'It may be convenient that all debts to be paid out of the assets of a deceased man's estate, shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statutes of a State, can deprive them of jurisdiction to hear and determine a controversy between citi-

zens of different States, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal, in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents.' "

III.

Where the Government has not pleaded the authority and direction required by U.S.C. (1946 ed.) Title 26, § 3740, nor offered any proof with respect thereto, and the Petitioner has pleaded lack of such authority and direction, they may not be presumed in the absence of proof to the contrary.

Please review at this point the matter appearing on page 11 *ff.*, as a reason why certiorari should be granted.

IV.

There is no authority for the bringing of a "proceeding in court" in a State court for the collection of a Federal tax not theretofore reduced to judgment in a United States District Court.

The Supreme Judicial Court cites no statutory provision which authorizes the United States to institute or prosecute a "proceeding in court" for the collection of a Federal tax in a State court.

The very wording of the only applicable statute negatives the grant of any statutory authority for the bringing of a "proceeding in court" as distinguished from an "action" or "suit." Section 3744 provides specifically (see also p. 20, above) that proceedings for the recovery of fines, penalties, and forfeitures shall be brought ". . . in any form of action, or *by any appropriate form of proceeding, qui tam or otherwise;*" whereas an action for taxes in the latter half of the same section may only "be sued for and recovered in . . . any proper form of action [which we say means "suit"]," there being conspicuously absent any reference to any other form of "proceeding."

The Supreme Judicial Court says that, since an execution from a District Court on a judgment in a Federal tax suit would not issue against an insolvent estate administered by the Probate Court but would be presented to the Probate Court for payment, Congress could not have intended to require the Government to take the intermediate step of suing on the tax claim in the United States District Court (R. p. 30).

We have already argued (p. 18 *ff.*, above) that it is not permissible for a court, in the face of clear language, to speculate as to what Congress intended by legislation; but even if the Supreme Judicial Court or this Court finds any reason to go beyond the clear language of U.S.C. (1946 ed.) Title 26, § 3744, so that the intention of Congress becomes material, your Petitioner thinks that Congress did intend to insure the taxpayer's right to have Federal tax claims litigated in Federal courts alone. There are a number of defenses which could be raised to a suit on an assessment, such as (1) the Federal statute of limitations, (2) lack of the authority and direction required by § 3740, (3) mistake of identity of the parties, (4) error appearing on the face of the assessment. Petitioner thinks Congress purposely intended to limit the trial of such issues to the Dis-

trict Courts of the United States. The Supreme Judicial Court, by assuming that the Government's claim was undisputed (R. p. 30) (despite Petitioner's plea of lack of the authorization and direction required by § 3740), concludes that a simple presentation of the claim to the Probate Court serves all the needs of the occasion. This is judicial legislation.

There is no Congressional prohibition against the Government presenting a judgment on a tax claim to the Probate Court. The claim has then merged in the judgment; the Government has had its right to the tax adjudicated by a United States Court (which was what the Congress of 1866 intended), *and the taxpayer has been afforded the opportunity to assert his defences in a United States Court.* This is a *substantial right* which cannot be denied the taxpayer by the subsequent determination of the State Court that he had no defenses to assert. This is analogous to a Court saying that a denial of trial by jury in a criminal case is no deprivation of the defendant's right, because the defendant was guilty anyway!

The deprivation of the right to be heard in a Federal court is more than a matter of form. It is a fair inference that Federal judges are better qualified by experience to interpret the intricacies of the Federal revenue laws and their application than are judges of the State courts. Congress has given the taxpayer the right to draw on this experience.

Counsel for the Government will doubtless urge that the Probate Court had jurisdiction by virtue of U.S.C. (1946 ed.) Title 26, § 276 (c),* which is as follows:

> "(c) *Collection After Assessment.* Where the assessment of any income tax imposed by this chapter

*Identical with Revenue Act of 1928, c. 852, § 276 (c), 45 Stat. 857, which is applicable to our period.

has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

This statute does not purport to confer jurisdiction, but to set up a period of limitation within which suit must be brought. **Section 3744 is the section conferring jurisdiction.** Common sense tells us that, if Congress had intended to grant jurisdiction to State courts to try Federal tax claims, it would have added the words "or before any other court of competent jurisdiction" to § 3744, just as it did to § 3745 (c). The titles of § 275, "Period of limitation upon assessment and collection," and of § 276, "Same—Exceptions," show the purpose of § 276 just as the title of § 3744, "Suits for Taxes," denotes its subject matter.

Inasmuch as § 276 (c) has not been heretofore interpreted to confer jurisdiction on a State court, and since such an interpretation seems in direct conflict with § 3744, which also has not been heretofore interpreted, Petitioner urges that this Court should grant his writ.

Conclusion.

The issues presented by this Petition involve substantial Federal questions since they concern themselves with the assumption of jurisdiction by State courts in the administration of the Federal tax system.

The question of what part State courts may play in the collection of Federal taxes has never been reviewed by this Court. In view of the assumption of jurisdiction by the courts of Massachusetts, New York, Illinois, and Florida, this question is of sufficiently broad public interest to warrant the granting of this Petition.

Respectfully submitted,

WALDO NOYES,

SENECA B. ANDERSON,

Attorneys for Petitioner.

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No. 487

Supreme Court of the United States.

OCTOBER TERM, 1949.

AMOS L. TAYLOR, EXECUTOR UNDER THE WILL OF JESSE P. LYMAN, *Petitioner*,

v.

UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS.

REPLY BRIEF OF AMOS L. TAYLOR, EXECUTOR, PETITIONER.

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ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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I.

Just below the middle of page 6 of the Government's Brief, the Solicitor General says: "It can hardly be supposed that Congress intended to compel the Government to pursue a more circuitous course with an admitted debt claim than other creditors in like circumstances . . . Decisions of the federal courts have, however, recognized that state probate courts may receive and allow claims for federal taxes, without making any distinction as to whether the claim is contested or uncontested."

In the first place, this statement is a flat denial of the correct doctrine enunciated by this and other Courts with

respect to statutory construction when there is no ambiguity. See Petitioner's Brief, pp. 18-19.

In the second place, the Solicitor General draws no distinction between claims for taxes which are disputed as such, and claims which in their inception are undisputed but the enforceability of which is disputed by reason of failure to comply with conditions precedent, such as that imposed by U.S.C. (1946 ed.) Title 26, § 3740; or by reason of an applicable statute of limitations, as, for instance, U.S.C. (1946 ed.) Title 26, § 276 (c). Petitioner's position is that any contest as to the collectibility of a Federal tax based upon defenses arising under the Federal statutes can be tried only in a District Court of the United States under the provisions of U.S.C. (1946 ed.) Title 26, § 3744.

In the third place, the cases cited by the Government at the bottom of pages 6 and 7 of its Brief as being cases which "recognized that state probate courts may receive and allow claims for federal taxes without making any distinction as to whether the claim is contested or uncontested" are, as pointed out in the Petitioner's Brief, cases where such claims were considered by Probate Courts *in the absence of any objection* thereto and without any decision as to whether they were properly before said Courts. See Petitioner's Brief, p. 29.

II.

The Solicitor General, at pages 7 and 8 of his Brief, relies upon the provisions of § 3466 of the Revised Statutes, set forth in the Appendix to his Brief, p. 16. This statute establishes on behalf of the United States a priority for the payment of taxes due to it, a pronouncement and requirement which have nothing to do with the manner of the collection of the tax and cannot properly be considered a qualification or limitation upon the requirements of

U.S.C. (1946 ed.) Title 26, § 3744, nor grant any immunity therefrom. Section 3466 is not a procedural statute relating to the commencement and prosecution of suits, and does not as such confer jurisdiction. The same is true of the "implementation" of § 3466 by § 3467. Section 3744 is the statute which confers and limits jurisdiction.

The point is that, while the Government establishes the priority of its claim to payment, it must enforce its claim in the way prescribed by the statute or the priority will be lost, because obviously, if the claim is lost, the priority will be lost as well.

III.

At the middle of page 8 the Solicitor General argues that "the practice of filing claims for unpaid taxes of deceased persons with their executors has long usage to support it and has never before been challenged," citing the cases, most of which have been explained by the Petitioner in his Brief, as cases where the jurisdiction of the Court has never been challenged or decided. Obviously, the fact that other defendants have slept on their rights or been unaware of them is immaterial as a matter of law on the question of whether this Petitioner, who has pleaded his defenses and the lack of jurisdiction in his case, has lost his rights. Mere usurpation, or continued abuse, of jurisdiction by courts, or violation of constitutional privileges, however long continued, can never in and of themselves create jurisdiction or destroy privileges which exist continuously as a matter of law.

In any event, the Solicitor General's argument, that a continued practice sanctifies and requires a judicial disregard of the unambiguous words of the statute, sets up a situation which in itself seems to call for review of this case upon certiorari.

IV.

On page 9 of his Brief the Solicitor General argues that the filing of the instant claim was a "proceeding in court" within the meaning of § 276 (c) and that it is sanctioned by that section. Again we must point out that § 276 (c) is not a statute conferring jurisdiction; it is really a statute of limitation. The only statutory jurisdiction conferred in this case is by § 3744. Abraham Lincoln is reported to have said: "Calling a sheep's leg a lamb's tail does not make it one." We urge again that this proof of claim was a suit because it had all the characteristics of a suit, see Petitioner's Brief, pp. 9-10, 32-35, and as a suit comes within the requirements of § 3744.

V.

Two-thirds of the way down page 9 the Solicitor General says: "The executor does not assert a conflict with any decision construing the statutory provisions involved in this case. . . ." Your Petitioner has clearly made the point, on pages 10 and 11 of the Petition, that § 3744 has never been judicially construed and that the decision below is in conflict with the clear meaning of the Federal statutes and the decisions of this Court which are cited at the top half of page 10 of the Petition.

VI.

Turning now to U.S.C. (1946 ed.) Title 26, § 3740, which contains the condition precedent to bringing suits for taxes, counsel for the Petitioner admit their inadvertent mistake in setting forth the current revision of this statute as applicable to the situation in the instant case (Government's Brief, p. 10, footnote). It is pointed out, however, that in any event R.S. § 3214 requires the authorization or sanc-

tion of the Commissioner of Internal Revenue, and that this was a condition precedent to the bringing of any suit.

The Solicitor General at page 10 of his Brief, says: ". . . the facts regarding such authority would not be essential elements of the cause of action involved in the suit to recover taxes, . . ." The words of the statute are: "No suit for the recovery of taxes . . . shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings." We must believe that these words of the statute have some effective meaning and are not utterly superfluous. The Solicitor General's argument, if adopted, would force one to construe the statute as meaning that the taxpayer's only right is to prove affirmatively the lack of authority in question under the double burden that (*a*) he cannot obtain, without the voluntary co-operation of the Government, the evidence necessary to support this burden of proof; and (*b*) he is called upon to prove the negative of a proposition, namely, that one specified act has never been performed. Under the Solicitor General's argument, unless the Government *chooses* to furnish the proof of its own lack of authority, the taxpayer is precluded even from challenge on that point—a result which violates a principal canon of statutory construction because no effect would be given to words which are clearly unambiguous.

VII.

At the bottom of page 10 the Solicitor General says: ". . . proper authorization for the claim filed by the Collector of Internal Revenue is to be presumed," citing cases in which the authority of the Collector has not been challenged, but paying no attention to the pertinent cited cases of *United States* v. *Cadillac Sedan*, 145 Fed. (2d) 296, and *Olson* v. *Mellon*, 41 Fed. Sup. 947, which relate directly to

the problem before this Court, being cases where the authority of the Collector has been seasonably challenged, see pp. 11-12 of the Petition; and pays likewise no attention to the rule of law enunciated by this Court in the three cases cited at the top of page 13 of the Petition to the effect that "nowhere is the presumption held to be a substitute for proof of an independent and material fact." Certainly a condition precedent prescribed by the statute is an independent and material fact.

VIII.

On page 11 of his Brief the Solicitor General says: ". . . the fact that the claim has been prosecuted to its present posture by the Attorney General on behalf of the Treasury Department gives ample proof that the filing of the claim has been sanctioned by both the Attorney General and the Commissioner." The fallacies of this argument are obvious:

(*a*) The requirement of the statute is for the performance of a condition precedent to the filing of suit, obviously within the required six-year period of the statute of limitation, § 276 (c).

(*b*) A sanction at this late date can at best be a ratification; coming in every respect after the commencement of suit and in large part after the expiration of the six-year statute of limitations § 276 (c), it cannot recreate a claim already outlawed, nor permit the prosecution of a claim barred by the decree of the District Court (R. p. 4, lines 99-101), because obviously this was not a "timely proceeding . . . pending in another court" if not brought in a court having jurisdiction and/or if the condition precedent to the bringing of the suit had not been complied with.

(*c*) A statute which prohibits suits "unless the Commissioner authorizes or sanctions the proceedings" is not

complied with by action of the Attorney General as a law officer acting on behalf of the Commissioner; the statute is specific that the Commissioner must authorize or sanction and there is no evidence that he did so—the record by its silence is eloquent of the fact that this requirement of § 3740 has not been met.

Respectfully submitted,

WALDO NOYES,

SENECA B. ANDERSON,

Attorneys for Petitioner.

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In the Supreme Court of the United States

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v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Probate Court filed a Report of Material Facts. (R. 1-5, 6.) The opinion of the Supreme Judicial Court of Massachusetts (R. 25-32) is reported at 324 Mass. 639.

JURISDICTION

The decree of the Probate Court of which review is here sought was entered on November 14, 1949, upon the rescript of the Supreme Judicial

Court of Massachusetts dated September 28, 1949. (R. 32-33.) The petition for a writ of certiorari was filed on December 19, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether Section 3213 of the Revised Statutes authorizing taxes to be sued for and recovered by the United States in the appropriate District Court of the United States prevented the allowance by the Probate Court of the undisputed claim for taxes assessed against the decedent, which was filed by the United States with Commissioners in insolvency appointed by the Probate Court.

2. Whether Section 3214 of the Revised Statutes required that the United States affirmatively prove that the Commissioner of Internal Revenue and the Attorney General had authorized the filing by the United States of its claim for assessed taxes.

STATUTES INVOLVED

The pertinent statutes are printed in the Appendix, *infra,* pp. 13-16.

STATEMENT

The testator, Jesse P. Lyman, died September 14, 1931, and his will was allowed and executors appointed and qualified October 6, 1931. The executors gave due notice of their appointment and filed an affidavit of such notice. (R. 2.)

The executors filed a representation of insolv-

ency on January 4, 1933 (R. 1, 2-3, 7), and commissioners to receive and examine all claims of creditors against the estate were duly appointed on March 31, 1933 (R. 16-17). At some time after this date the United States filed a claim for taxes with the commissioners in insolvency. (R. 4.)

On January 3, 1934, the commissioners filed their report allowing the claim of the United States for income taxes for the years 1930 and 1931 as a claim of the first class in the sum of $67,868.59. (R. 1, 3, 18-19.) On July 14, 1939, the executors filed a motion that the report of the commissioners be accepted and confirmed but no action was taken on the motion. (R. 1.)

On May 18, 1938, the United States commenced an action in the United States District Court for the District of Massachusetts, to collect the 1930 tax here in issue and the tax for 1931, included in the claim as allowed by the commissioners. (R. 4.) The 1930 income taxes, owed by the decedent at the date of his death, were assessed May 25, 1931. (R. 6.) The defense with respect to the 1930 tax was that the suit was barred by the six year statute of limitations provided by Section 276 (c) of the Revenue Act of 1928. The District Court dismissed the count for the 1930 tax "without prejudice to the right of the plaintiff to prosecute any other timely proceeding upon the same subject matter now pending in another Court." (R. 4.)

Upon the executor's petition, as amended, praying that the estate be determined to be solvent and that the claim of the United States as allowed in the report of the commissioners of insolvency be stricken out or reduced (R. 7-9), the Probate Court held that the estate was now solvent (R. 2) and that the claim of the United States for the 1930 tax of $31,990.36 was wrongfully allowed by the commissioners, because the claim was not filed within one year from the time when the executors gave bond and qualified as provided in Section 9, Chapter 197, II General Laws of Massachusetts (Ter. ed.), (R. 3, 4-5). Accordingly, it entered a decree reducing the claim of the United States as allowed by the commissioners to $35,878.23. (R. 10-11.)

On appeal by the United States the Supreme Judicial Court of Massachusetts reversed the Probate Court (R. 25-32) and ordered that part of the decree reducing the amount allowed on the claim of the United States to be struck out and that the full amount allowed by the commissioners is to stand as allowed (R. 25).

The executor seeks certiorari only with respect to the holdings that Sections 3744 and 3745 (c) of the Internal Revenue Code (the same as Section 3213 of the Revised Statutes) did not withhold jurisdiction from the Probate Court to allow the uncontested claim for 1930 taxes (R. 28-31) and that compliance with the terms of Section 3740 of

the Internal Revenue Code (see Section 3214 of the Revised Statutes, the statute in effect when the claim for taxes was filed), assuming it is applicable to the proceedings in this case, will be presumed (R. 31).

ARGUMENT

1. The jurisdiction of this Court is here ~~involved~~ involved (Pet. 2-3) under 28 U.S.C., Sec. 1257 (3), solely upon the ground that the decision of the Supreme Judicial Court of Massachusetts denies the petitioner three immunities granted him by federal statutes; immunity from suits for the recovery of federal taxes in all courts except the District Court of the United States; immunity from suits for the recovery of federal taxes not authorized by the Commissioner of Internal Revenue and directed by the Attorney General; and immunity from the enforcement of a federal tax other than by distraint or by suit in the District Court. These immunities are claimed, so far as here relevant, under Sections 3213 and 3214 of the Revised Statutes. (Appendix, *infra*, pp. 15-16). If, as we shall show, these sections did not forbid the filing of the undisputed claim for taxes assessed for 1930 with the Probate Court and the allowance of the claim by the court, the claimed immunities do not exist, or if they exist, they have not been denied in this case.

2. Section 3213 of the Revised Statutes, which authorizes taxes to be sued for and recovered in the name of the United States in the appropriate

District Court of the United States, did not bar the allowance of the undisputed claim for 1930 taxes by the Probate Court. The filing of the claim was not a suit for the recovery of taxes within the meaning of that section, even if it is assumed *arguendo* that that section confines jurisdiction over suits to recover taxes in all cases to the District Courts.

As the Supreme Judicial Court pointed out (R. 30), Section 3213 cannot reasonably be interpreted to apply to uncontested claims for taxes filed against the estate of a deceased person, because to do so would require an unnecessary suit in the District Court for a tax admittedly due without obviating the necessity of presenting the claim to the State Court, which has custody of the assets of the estate. Taxes due to the United States are debts (*Price* v. *United States,* 269 U. S. 492, 499), and it can hardly be supposed that Congress intended to compel the Government to pursue a more circuitous course with an admitted debt claim than other creditors in like circumstances. The court expressly did not decide whether Section 3213 would require suit in the District Court if the claim were contested. (R. 30.) Decisions of the federal courts have, however, recognized that state probate courts may receive and allow claims for federal taxes, without making any distinction as to whether the claim is contested or uncontested. *United States* v. *Ettelson,* 159 F. 2d

193 (C.A. 7th); *United States* v. *Peoples Trust & Savings Co.*, 97 F. 2d 771 (C.A. 7th); *United States* v. *First Nat. Bank*, 54 F. Supp. 351 (N.D. Ohio); cf. *United States* v. *Paisley*, 26 F. Supp. 237 (N.D. Ill.).

The provisions of Section 3466 of the Revised Statutes (Appendix, *infra*, p. 16) strengthen the conclusion that Congress never meant to require the United States to reduce its tax claims to judgment in a suit in a District Court as a prerequisite to enforcement of such claims in a state insolvency or probate proceeding. The stipulation of the section, that in cases of insolvency of a debtor or an estate covered by the section the debts due the United States shall first be satisfied,[1] has never, so far as is known, been held to give priority only in cases where the tax claim has been reduced to judgment by suit in a District Court. Cf., *e.g.*, *Illinois* v. *United States*, 328 U. S. 8; *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480. On the contrary, the priority attaches in favor of a tax claim if it is a "debt", that is, if liability for the tax has been incurred, even

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[1] The priority thus given in the case of estates is implemented by Section 3467 of the Revised Statutes (Appendix, *infra*, p. 16) which provides that any executor or administrator who pays in whole or in part any debt due by the estate for which he acts before he satisfies and pays the debts due the United States from such estate, shall become answerable in his own person and estate to the extent of such payments for the debts due the United States.

though the tax has not been assessed. See *Spokane County* v. *United States,* 279 U. S. 80, 93; and cf. *Massachusetts* v. *United States,* 333 U. S. 611, 617 (fn. 8), 625-626, where the Court held that priority attached as to all the federal taxes due on the date of the assignment, even though some of the taxes were formally assessed after that date. In the present case the estate had been represented to be insolvent and the Probate Court thus had jurisdiction to settle the estate as an insolvent estate (*Greenwood* v. *McGilvray,* 120 Mass. 516, and see Sec. 2, c. 198, II General Laws of Massachusetts, Appendix, *infra,* p. 14), prior to the time the United States presented its claim for taxes. The 1930 tax here in issue had already been assessed. Under Section 3466 the filing of the claim with the estate was manifestly proper.[2]

Moreover, the practice of filing claims for unpaid taxes of deceased persons with their executors has long usage to support it and has never before been challenged. *Matter of Gellatly,* 283 N.Y. 125; *Matter of Smathers,* 249 App. Div. (N.Y.) 523; *Harrison* v. *Deutsch,* 294 Ill. App. 8; *United States* v. *Embrey,* 145 Fla. 277; and see cases cited *supra,* pp. 6 & 7.

Finally, Section 276 (c) of the Revenue Act of 1928 (Appendix, *infra,* p. 14) provides that a tax

[2] The estate only became solvent at a much later date as the result of litigation ending in a compromise. (R. 26.) The petition for a determination that the estate was solvent was not filed until 1948. (R. 7-8.)

which has been timely assessed may be collected by distraint or by a proceeding in court, but only if begun within six years after assessment or within the period for collection agreed upon in writing by the Commissioner and the taxpayer. The filing of the claim with the commissioners appointed by the Probate Court was clearly a "proceeding in court" within the meaning of Section 276 (c) (see *Robinson* v. *Robinson,* 173 Mass. 233, 241-243; *United States* v. *Ettelson,* 159 F. 2d 193, 196 (C.A. 7th); *United States* v. *Paisley,* 26 F. Supp. 237 (N.D. Ill.); *United States* v. *First Nat. Bank,* 54 F. Supp. 351 (N.D. Ohio)) and was filed within the six year period there provided, as the Supreme Judicial Court held. (R. 26-27.) The procedure followed in this case was thus expressly sanctioned by Section 276 (c).

It follows that the Supreme Judicial Court correctly decided that the Probate Court was not deprived by Section 3213 of the Revised Statutes of jurisdiction to decree that the claim of the United States for 1930 taxes is to be paid by the estate. The executor does not assert a conflict with any decision construing the statutory provisions involved in this case, and cases construing other statutes are not persuasive in light of the considerations already given.

3. Section 3214 of the Revised Statutes (Appendix, *infra,* p. 15) which was in effect when the

claim for taxes was filed with the commissioners, provides that no suit for the recovery of taxes shall be commenced unless the Commissioner of Internal Revenue authorizes it.[3] It seems clear that this provision is designed merely to prevent the institution of suits to recover taxes by Collectors except upon proper authority and that the facts regarding such authority would not be essential elements of the cause of action involved in the suit to recover taxes, as the lower court held. (R. 31.) In any event, the filing of the claim for taxes with the estate was not a suit for the recovery of taxes within the meaning of that section. Even assuming *arguendo* that the filing of the claim was such a suit, the court below correctly held (R. 31) that proper authorization for the claim filed by the Collector of Internal Revenue is to be presumed. See *Stearns Co.* v. *United States,* 291 U.S. 54, 62-64. *United States* v. *Ettelson,* 159 F. 2d 193, 195-

[3] The petitioner is apparently in error in quoting (Pet. 7) Section 3214 as including the provision that the Attorney General must direct that a suit to recover taxes be commenced. While it is true that Section 3740 of the Internal Revenue Code (26 U.S.C. 1946 ed., Section 3740) so provides, Section 3214 of the Revised Statutes was not amended to require authorization by the Attorney General for such a suit. Section 16 of the Act of March 3, 1933, c. 212, 47 Stat. 1489, 1517-1519, which was referred to in the notes to 26 U.S.C. 1946 ed., Section 3740, gave the President the power to transfer functions from one executive agency to another by executive order. Executive Order No. 6166, Section 5 (printed at 5 U.S.C. 1946 ed., Sections 124-132) transferred the functions of prosecuting or abandoning prosecution of claims in courts of the United States to the Department of Justice. It was apparently from this section of the executive order that Section 3740 in its present form was derived.

196 (C.A. 7th) expressly ruled that where a Collector files a claim for taxes with a probate court, it will be presumed that he had in his possession the assessment lists, which constitute his authority from the Commissioner to collect the taxes included therein. In the present case there is nothing to indicate that the Collector had not been authorized to collect the tax by filing claim for it with the decedent's estate.

Apart from the presumption that the Collector of Internal Revenue had received authority from the Commissioner of Internal Revenue to file the claim for taxes in this case, the fact that the claim has been prosecuted to its present posture by the Attorney General on behalf of the Treasury Department gives ample proof that the filing of the claim has been sanctioned by both the Attorney General and the Commissioner. This would comply with Section 3214 of the Revised Statutes, assuming *arguendo* that it is applicable to the filing of a claim, and indeed it would comply with Section 3740 of the Internal Revenue Code (see fn. 3, *supra,* p. 10), even though that section was not enacted until 1939 and thus was not in effect when the claim was filed in 1933.

CONCLUSION

The decision of the Supreme Judicial Court correctly construed and applied the federal statutes involved in this case. It denies the petitioner no

"immunity" granted by the statutes. There is no conflict. The petition for certiorari should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

JANUARY, 1950.

II General Laws of Massachusetts (Ter. ed.):

Chapter 197:

SECTION 9. Except as provided in this chapter, an executor or administrator, after having given due notice of his appointment, shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced but not entered within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. An executor, administrator or administrator de bonis non shall not be held to answer to an action by a creditor of the deceased which is commenced but not entered within any other or additional period of limitation for bringing such action provided by or under this chapter unless before the expiration of such period the writ in such action has been served by delivery in hand upon him or service thereof accepted by him or a notice as aforesaid has been filed in the proper registry of probate. The probate court may allow creditors further time for bringing actions, not ex-

ceeding two years from the time of the giving of his official bond by such executor or administrator, provided that application for such further time be made before the expiration of one year from the time of the approval of the bond.

* * * * *

Chapter 198:

SECTION 2. If the probate court finds from the representation of an executor or administrator that the estate of the deceased will probably be insufficient for the payment of his debts, it may appoint two or more commissioners to receive and examine all claims of creditors against such estate, and to return a list of all claims presented to them, with the amount allowed on each. All debts of the estate of said deceased not at the time of such finding barred by any statute of limitations may be allowed either by said commissioners or by said court.

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 276. SAME—EXCEPTIONS.

* * * * *

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within

six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

Revised Statutes:

SEC. 3213. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action.

SEC. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of In-

ternal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit.

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1946 ed., Sec. 191.)

SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(31 U.S.C. 1946 ed., Sec. 192.)

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